In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1275

METROPOLITAN TRASH, INC., PETITIONER

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is a suit for enforcement of the overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938 (the "Act"), 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* Petitioner, which is engaged in the trash removal business, seeks review of two rulings of the court of appeals: (1) that petitioner is an enterprise whose employees are within the Act's coverage because some of its employees perform functions that are closely related and directly essential to the production of goods for interstate commerce; and (2) that petitioner is not entitled to the special exemption for certain "retail or service establishments" in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2). Both rulings are correct and present no conflict with decisions of other courts of appeals or of this Court.

1. Petitioner stipulated before trial that it was within the Act's definition of an "enterprise" at Section 3(r), 29 U.S.C. 203(r) (R. 13); and that its annual volume of sales has, since January 1, 1971, exceeded $250,000 exclusive of excise taxes at the retail level separately stated (Pet. 4), as specified in Section 3(s)(1), 29 U.S.C. 203(s)(1). Thus, the issue at trial was whether petitioner, as an enterprise with the requisite dollar volume of sales under Section 3(s)(1), had some employees whose activities were closely related and directly essential to production of goods for commerce, within the meaning of Section 3(j) of the Act, 29 U.S.C. 203(j), thereby bringing all of its employees within the Act's coverage. On this issue, the district court found that at least 95 percent of petitioner's income is derived from commercial customers (Pet. App. 2a-3a), including six major interstate producers whose operations would probably cease if their trash were not removed regularly (Pet. App. 4a, n. 3). For this reason—and wholly apart from the fact that petitioner's employees admittedly handled, on a regular basis, a large quantity of goods which had been shipped in interstate commerce[1]—the district court held that petitioner was a covered enterprise and that its employees were subject to the Act's overtime and recordkeeping provisions.

This holding is directly supported by *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911, and *Schultz* v. *Instant Handling, Inc.*, 418 F. 2d 1019 (C.A. 5). In each of those cases, as here, employees who removed refuse and industrial waste from facilities used by others in the production of goods for commerce were held to be covered by the Act on the ground that the employees were engaged in work which was closely related and directly essential to such production. As the

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[1]Petitioner stipulated that at least 80 percent of its equipment and repair items are manufactured out-of-state (Pet. App. 3a).

Fifth Circuit noted in *Instant Handling, supra,* the removal of trash was "essential to the continued operation" of two of the defendant's main customers (418 F. 2d at 1022). See also *Wirtz* v. *English,* 245 F. Supp. 628 (D. Kan.); *Hodgson* v. *Elmer's Disposal Service, Inc.,* 68 CCH Lab. Cas. par. 32,706 (S.D. Cal., not otherwise reported), affirmed on other grounds, 510 F. 2d 84 (C.A. 9).[2]

Petitioner's reliance on *Wirtz* v. *Modern Trashmoval, Inc.,* 323 F. 2d 451 (C.A. 4), certiorari denied, 377 U.S. 925, is unpersuasive. In that case, only 10 to 15 percent of the company's customers were engaged in the production of goods for commerce. 323 F.2d at 454. Furthermore, the company's employees had "contact for no more than a few minutes each week" with interstate producers. *Id.* at 462. Here, in contrast, the evidence showed that some of petitioner's employees spent a substantial portion of their time servicing commercial and industrial customers (Pet. App. 4a). Representatives of the six major interstate producers having contracts with petitioner testified that petitioner's employees removed trash from their production facilities three to six times a week and that they spent from 30 minutes to an hour and a half each time (*e.g.,* Tr. 8-9, 14, 19, 28, 37, 43). The

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[2]In addition to relying on the cases cited in the text, the court of appeals analogized petitioner's trash removal services to cleaning and maintenance services which have been held to be closely related and directly essential to the production of goods for commerce within the meaning of Section 3(j). See, *e.g., Borden Co.* v. *Borella,* 325 U.S. 679; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Nunn's Battery and Electric Co.* v. *Wirtz,* 335 F. 2d 599 (C.A. 5); *Mitchell* v. *Mercer Water Co.,* 208 F. 2d 900 (C.A. 3).

evidence also established that petitioner used specialized equipment—known as "roll-off" boxes or containers with a capacity up to 43 cubic yards—to remove the trash of these interstate producers (Tr. 8).[3]

2. The court of appeals also correctly denied petitioner's claim to the exemption provided in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2), for certain retail and service establishments. Petitioner did not raise this issue prior to moving for a new trial (Pet. 6). As a result, the record contains no evidence to prove that any of the percentage tests prescribed by that exemption have been met. These tests, as this Court has repeatedly emphasized, are not merely "suggested guidelines for judicial determination" but rather are "explicit prerequisites to exemption"; it is, moreover, the employer's burden to prove "plainly and unmistakably" that each test has been met. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. See *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206, 209, rehearing denied 383 U.S. 963; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493.

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[3]The instant case is also distinguishable from *Wirtz* v. *Modern Trashmoval*, *supra*, because petitioner's employees regularly handle goods which have moved in interstate commerce and petitioner's annual dollar volume of sales is in excess of $250,000. *Modern Trashmoval* dealt with a period prior to the addition of Section 3(s) to the Act, extending coverage to "enterprises" having employees "handling" such goods (Fair Labor Standards Amendments of 1961, 75 Stat. 66). The court of appeals noted in this regard that 80 percent of the goods used by petitioner's employees in the performance of their work (such as trucks, the special roll-off boxes or containers, repair items, fuel and lubricants) had been moved in or produced for commerce (see Pet. App. 3a). Similar facts were found sufficient to establish coverage in *Brennan* v. *Dillion*, 483 F.2d 1334 (C.A. 10), and *Brennan* v. *State of Iowa*, 494 F. 2d 100 (C.A. 8), petition for writ of certiorari pending, No. 73-1565, filed April 19, 1974. In *Dillion*, employees of an apartment complex were held to be covered

Also fatal to petitioner's belated claim to the Section 13(a)(2) exemption is the stipulated fact that during the period in question petitioner had an annual gross volume of sales of not less than $250,000 exclusive of excise taxes. The exemption contained in Section 13(a)(2) is expressly limited to an "establishment [which] has an annual dollar volume of sales which is *less than* $250,000 (exclusive of excise taxes at the retail level which are separately stated)" (emphasis added). Moreover, the exemption is limited to an "establishment [which] is not in an enterprise described in section 3(s) * * *," and petitioner's business is such an enterprise.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1975.

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by reason of their regular handling of soap, paint, light bulbs and other supplies which had been moved in commerce. In *Iowa*, hospital employees were deemed covered because they regularly handled linens and medical and cleaning supplies which had been produced outside the state. For express congressional approval of the *Dillion* case and its progeny, see S. Rep. No. 93-690, 93d Cong., 2d Sess. 17 (1974).